

1 **WO**

NOT FOR PUBLICATION

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 John Horanzy,

10 Plaintiff,

11 v.

12 Vemma Nutrition Company, *et al.*,

13 Defendants.
14

No. CV-15-00298-PHX-JJT

ORDER

15 At issue are Defendants Vemma Nutrition Company and Yibing Wang's Second
16 Motion to Dismiss (Doc. 57, MTD), to which Plaintiff John Horanzy filed a Response
17 (Doc. 59), and Defendants filed a Reply (Doc. 60); and Plaintiff's Request for an Order
18 Directing the Parties and the Federal Trade Commission to Appear for a Settlement
19 Conference (Doc. 61, Pl.'s Req.), to which Defendants filed a Response (Doc. 62). For
20 the reasons that follow, the Court denies Defendants' Motion to Dismiss Count Five of
21 Plaintiff's Amended Complaint (Doc. 57) and denies Plaintiff's Request (Doc. 61).

22 **I. BACKGROUND**

23 For the purposes of this Order, the Court adopts its recitation of the background of
24 this case in its July 30, 2015 Order (Doc. 45), in which it granted in part and denied in
25 part Defendants Vemma Nutrition Company, Benson Boreyko, and Yibing Wang's
26 Motions to Dismiss.

27 Additionally, Plaintiff includes new pertinent allegations in his Amended
28 Complaint that the Court will consider in its analysis below. Plaintiff alleges that,

1 between 2008 and 2011 in New York, he purchased Vemma products in person from a
 2 Vemma distributor. (Doc. 46, Am. Compl. ¶ 10.) Plaintiff told the distributor about his
 3 personal medical condition, and the distributor then pitched the Vemma products to
 4 Plaintiff “using a personal health testimonial that the product helped the distributor
 5 alleviate a disease that previously required treatment by prescription drugs.” (Am.
 6 Compl. ¶ 10.) The distributor also stated that the products’ “Mangosteen ingredient . . .
 7 could cure a host of medical diseases.” (Am. Compl. ¶ 10.) In deciding to purchase the
 8 products, Plaintiff also alleges he relied on marketing representations from the products’
 9 label and packaging and from Vemma’s website, including that the products cure or
 10 alleviate diseases. (Am. Compl. ¶ 10.)

11 **II. RULE 9(B) MOTION TO DISMISS**

12 A defendant may seek dismissal of a fraud-based claim for failure to meet the
 13 heightened pleading standard of Federal Rule of Civil Procedure 9(b) in the same manner
 14 it seeks dismissal of a claim under Federal Rule of Civil Procedure 12(b)(6). *Vess v.*
 15 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107-08 (9th Cir. 2003). Rule 9(b) requires that,
 16 in alleging fraud or mistake, “a party must state with particularity the circumstances
 17 constituting fraud or mistake.” This pleading standard also applies to claims for
 18 misrepresentation. *Arnold & Assocs., Inc. v. Misys Healthcare Sys.*, 275 F. Supp. 2d
 19 1013, 1028 (D. Ariz. 2003) (citing *Wyatt v. Terhune*, 315 F.3d 1108, 1118 (9th Cir.
 20 2003)). To meet the Rule 9(b) particularity requirement, a plaintiff “must include
 21 statements regarding the time, place, and nature of the alleged fraudulent activities,” and
 22 “‘mere conclusory allegations of fraud are insufficient.’” *In re GlenFed, Inc. Sec. Litig.*,
 23 42 F.3d 1541, 1548 (9th Cir. 1994) (*en banc*), *superseded by statute on other grounds*,
 24 Private Secs. Litig. Reform Act of 1995, Pub. Law 104-67 (codified at 15 U.S.C. § 78u-4
 25 (1995)). Thus, “[a]llegations of fraud must be accompanied by ‘the who, what, when,
 26 where, and how’ of the misconduct charged.” *Vess*, 317 F.3d at 1106 (quoting *Cooper v.*
 27 *Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). Furthermore,

1 a plaintiff must set forth more than the neutral facts necessary to identify
2 the transaction. The plaintiff must set forth what is false or misleading
3 about a statement, and why it is false. In other words, the plaintiff must set
4 forth an explanation as to why the statement or omission complained of was
false or misleading.

5 *GlenFed*, 42 F.3d at 1548.

6 Here, Defendants move to dismiss Plaintiff's fraud claim, Count Five of the
7 Amended Complaint, for failure to plead with sufficient particularity as required by Rule
8 9(b). (MTD at 1.) Defendants argue that, in order to state his fraud claim, Plaintiff must
9 allege sufficient facts to meet the higher pleading standard for *both* the Vemma
10 distributor's verbal representations in New York *and* the written representations available
11 online. (MTD at 4-5.)

12 As discussed above, in order to move a fraud claim beyond the motion to dismiss
13 stage, Plaintiff must include "the who, what, when, where, and how of the misconduct
14 charged." *Vess*, 317 F.3d at 1106. When a plaintiff alleges a fraudulent advertising
15 campaign conveyed through various media (*i.e.*, print, online, verbal), the plaintiff need
16 only allege a single specific instance of exposure to that allegedly fraudulent material,
17 and does not need to meet the Rule 9(b) pleading standard for each medium of
18 advertising upon which he could have relied. *See, e.g., In re Oreck Corp. Halo Vacuum*
19 *& Air Purifiers Mktg. & Sales Practices Litig.*, No. ML 12-2317-CAS (JEMx), 2012 WL
20 6062047, at *14-15 (C.D. Cal. Dec. 3, 2012) ("It suffices for plaintiffs to provide
21 examples of advertisements similar to those they saw as long as all the advertisements
22 convey the core allegedly fraudulent message."); *Rikos v. Proctor & Gamble Co.*, 782 F.
23 Supp. 2d 522, 535 (S.D. Ohio 2011) (concluding that alleging a single specific instance
24 of exposure to an allegedly fraudulent advertising campaign is sufficient to state a claim
25 under Rule 9(b)); *Morey v. NextFoods, Inc.*, No. 10-CV-761-JM (NLS), 2010 WL
26 2473314, at *2 (S.D. Cal. June 7, 2010) (same).

27 Plaintiff's allegations of fraud are sufficient under Rule 9(b). In his Amended
28 Complaint, Plaintiff fulfills the "who," "when," and "where" elements by alleging a

1 specific instance of deceptive statements, made in New York between 2008 and 2011, by
2 a Vemma distributor and directed at Plaintiff personally. (Am. Compl. ¶ 10.)
3 Additionally, fulfilling the “what” and “how” elements, Plaintiff alleges that he relied on
4 the verbal representations, product packaging, and online testimonials, all stating that
5 Vemma products were “clinically studied” and “physician formulated” and could cure or
6 alleviate certain diseases. (Am. Compl. ¶ 10.) The specific example provided by Plaintiff
7 is sufficient to meet the Rule 9(b) pleading standard.

8 Plaintiff’s specific allegations are tied to broader allegations of similar
9 representations by Vemma, which together Plaintiff claims form a “common scheme” of
10 fraudulent conduct. (Am. Compl. ¶¶ 10, 90-120.) But Plaintiff need only meet the Rule
11 9(b) pleading standard for one instance of alleged fraud, *see Rikos*, 782 F. Supp. 2d at
12 535, and because Plaintiff’s specific allegation of a misrepresentation meets the standard,
13 Plaintiff’s fraud claim survives Defendants’ Motion to Dismiss.

14 **III. MOTION FOR SETTLEMENT CONFERENCE WITH FTC**

15 In his Motion, Plaintiff requests that the Court order that he receive notice and an
16 opportunity to attend any settlement conference in a separate action before this Court
17 brought by the Federal Trade Commission (FTC) against Defendant Vemma Nutrition
18 Company, Case Number CV-15-01578-PHX-JJT. (Pl.’s Req. at 1-2.) Plaintiff argues that
19 the FTC has indicated that it is investigating Vemma’s compliance with a 1999 Consent
20 Decree between the FTC and Vemma’s predecessor concerning the predecessor’s
21 marketing practices, and that investigation could bear on Plaintiff’s present claims against
22 Vemma. (Pl.’s Req. at 1-2.)

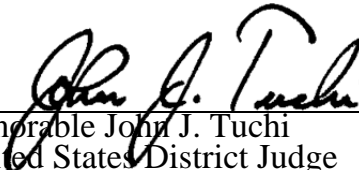
23 To begin with, any investigation by the FTC into Vemma’s compliance with the
24 1999 Consent Decree is not presently a case or controversy before this Court, so
25 Plaintiff’s request is hypothetical as to the Court’s setting of a settlement conference with
26 respect to that issue. Moreover, there is presently no significant overlap between
27 Plaintiff’s and the FTC’s claims against Vemma in their respective lawsuits, so the Court
28

1 has no cause to order that Plaintiff receive notice and an opportunity to attend any
2 settlement conference in the FTC case.

3 **IT IS THEREFORE ORDERED** denying Defendants' Second Motion to
4 Dismiss (Doc. 57).

5 **IT IS FURTHER ORDERED** denying Plaintiff's Request for an Order Directing
6 the Parties and the Federal Trade Commission to Appear for a Settlement Conference
7 (Doc. 61).

8 Dated this 15th day of April, 2016.

9
10
11 
12 Honorable John J. Tuchi
13 United States District Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28